85-441

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LILLIAN ROBERTS, as Commissioner
of Labor of the State of New York,

Appellant,

— against —

BURLINGTON INDUSTRIES, INC.,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Is an employer's agreement, contained in a simple personnel policy, to pay severance pay an "employee welfare benefit plan" subject to the preemption provision of the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.*, so as to prohibit the Commissioner of Labor of the State of New York from enforcing an order issued pursuant to the state wage and benefit collection statute requiring the employer to pay benefits pursuant to its policy?*

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* The caption of the case in this Court does not contain the names of the individual plaintiffs, who were also appellants in the Court of Appeals for the Second Circuit. They will also docket an appeal to this Court. Their names are Irving Gilbert, Irene Prince, David J. Frank, Herbert R. Kaplan, Bernard B. Largman, Dora Nicolini, Herbert Peppel, Bertha Richie, David Schoeneck, Raquel R. Silensky, Marie Silvestri, Brenda Tillman Humphreys, B. Gaither Shaw, Jr., Robert S. Ahrens, Benjamin F. Blye, Jr., David H. Brunt, Jack R. Carpenter, Kenneth E. Eckard, Ronald F. Gauthier, Louis Gorelick, Jeremy Harris, Ronald H. Hicks, Robert D. Huddleston, Thomas R. Jerome, Gaston D. Lopez, Michael Loschenko, Phillip R. Mullins, Dorothy Novak, Anthony J. Petronis, Bernard Porvin, Charles A. Powers, Saul Roth, James A. Sbarboro, John Sells, James M. Stutts, and Gordon L. Van Dusen.

Appellant Commissioner of Labor of the State of New York and the above individual appellants submit herewith a separately bound joint appendix. The joint appendix is cited herein as (A-).

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The United States Court of Appeals for the Second Circuit rendered its decision and entered judgment on June 17, 1985. (A-1). This decision is reported. *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985). ("Burlington II"). On September 17, 1984, the United States District Court for the Southern District of New York rendered a decision granting the motion to dismiss of defendant Burlington Industries, Inc. ("Burlington"), dismissing the complaint of appellant Lillian Roberts, Commissioner of Labor of the State of New York ("appellant" or "Commissioner"), and enjoining the Commissioner

from enforcing N.Y. Labor Law 198-c against defendant. (A-21). ("Burlington I"). This decision is not reported.

JURISDICTION

This is a civil action by 36 former employees of Burlington Industries, Inc. claiming severance pay under N.Y. Labor Law §198-c, state common law, and, alternatively, under the federal Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.* The plaintiffs claimed the district court had diversity jurisdiction of the state law claims under 28 U.S.C. §1332 and federal question jurisdiction of the federal claims under 28 U.S.C. §1331.

The United States Court of Appeals for the Second Circuit held that N.Y. Labor Law §198-c was preempted by federal law, and it entered judgment on June 17, 1985. (A-1). No party sought a rehearing. The Commissioner filed a timely notice of appeal to this Court on September 11, 1985, in the United States Court of Appeals for the Second Circuit. (A-36).

This Court has jurisdiction of this appeal under 28 U.S.C. §1254(2).

STATUTORY PROVISIONS INVOLVED

Relevant portions of the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. §1001 *et seq.* ("ERISA"), United States Department of Labor regulation, 29 C.F.R. §2510.3-1, and N.Y. Labor Law §198-c are reprinted in the joint appendix (A-40).

STATEMENT OF THE CASE

1. Facts Material To Consideration Of The Question Presented

Plaintiffs were all formerly merchandising employees of Burlington's Socks and Hosiery Divisions in the company's New York office. *Burlington II* (A-4). In 1982, Burlington sold the Socks and

Hosiery Divisions as a going concern to Kayser-Roth Corporation and plaintiffs were terminated from Burlington. *Burlington II* (A-5). In order to ensure that those employees would accept employment with Kayser-Roth, Burlington agreed it would not permit them to transfer to other jobs with Burlington, and the company declined to rehire employees accepted by Kayser-Roth for at least six months after the sale. *Burlington II* (A-5). At the time they were terminated, the individual plaintiffs had worked for Burlington for between six and 26 years.

Shortly before the sale to Kayser-Roth, Burlington informed its terminated employees that they would not receive severance pay since Kayser Roth would employ them. *Burlington II* (A-7). The employees were denied severance pay whether or not they accepted jobs on the terms offered by Kayser-Roth.*

Since 1953, Burlington has paid severance pay to employees who are involuntarily terminated based on a written personnel policy. The policy was for many years contained in a company policy manual, distributed only to management employees.**

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* Since Kayser-Roth had no severance pay policy and refused to assume Burlington's policy, the plaintiffs were required to give up their rights to that benefit as a result of the sale.

** At the time of the sale, the company policy manual read, in relevant part:

I. Company Policy

A. General—The Company makes payroll severance payments and vacation severance payments to eligible salaried employees who are terminated from the Company.

B. Payment—Payroll severance payments are based upon tables contained in this policy. Vacation severance payments are based upon a person's length of continuous service with the Company less vacation taken or adjusted as defined by this policy.

II. Application of Policy

A. Payroll Severance—All regular full-time salaried employees who meet eligibility requirements are paid payroll severance based upon continuous service as shown in Exhibit A or Exhibit B.

(Footnote Continued)

Burlington II (A-5). Beginning in 1974, it was communicated to all employees through the Salaried Employees' Handbook.* *Burlington II* (A-6).

Burlington's severance pay policy was administered by Burlington itself through its personnel and payroll departments. Like vacation pay and other benefits of that type, severance pay by the company was automatic; there existed no application procedure. *Burlington II* (A-6). Severance payments were made out of Burlington's general assets. The company did not segregate any assets from which to pay severance pay and it maintained no fund, no trust or separate account, and no insurance from which severance payments were made. Severance payments were treated like wages; all legal withholding deductions, such as income tax and social security tax, were made from the payments.

Although Burlington had been aware of ERISA's requirements since at least 1975, and conformed certain of its policies to it, not until after the sale did Burlington treat its severance pay policy as governed by ERISA. Only after the plaintiffs began filing claims for severance pay with the New York State Department of Labor did it provide its remaining employees with a "summary plan description," as required by ERISA, or advise them

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> l. Eligibility – Employees are eligible to receive payroll severance if they are regular full-time salaried employees who are *involuntarily terminated from the Company*. Eligibility requirements are:
>
> a. Job Elimination – This category consists of terminations due to circumstances such as elimination or modification of operations or other job elimination due to bona fide organizational changes. (emphasis added).

* The Handbook provided at the time of the sale:

> The company provides severance pay to full time employees who *involuntarily leave the company*. Pay ranges from two weeks to 12 months, based on the employee's age and length of continuous service with the company. Fraud or other behavior deemed to be willful could disqualify an employee from receiving severance benefits. (emphasis added).

of their rights under ERISA. At no point did Burlington hold any assets in trust or appoint any trustees to manage the policy, as ERISA demands. Similarly, Burlington did not designate a fiduciary for the policy, publish or file an annual report, a financial statement, or a plan description, as required by ERISA. *Burlington II* (A-6).

2. The Course Of Proceedings And Disposition In The Courts Below

The individual plaintiffs commenced this action on September 22, 1983 to recover severance pay. *Burlington I* (A-25). They alleged seven causes of action under state law, including causes of action under N.Y. Labor Law 198-c and for breach of contract, and four causes of action under ERISA. *Burlington II* (A-4).

Before commencing this action, ten of the plaintiffs along with other former employees of Burlington, had filed administrative claims for severance pay with the New York State Department of Labor pursuant to N.Y. Labor Law 198-c.* *Burlington I* (A-24). The Commissioner, after investigation and a compliance conference, issued an order on September 2, 1983, directing Burlington to pay the claimants severance pay in accordance with its policy. *Burlington II* (A-24-A-25). Pursuant to N.Y. Labor Law §101, Burlington filed a petition for review of that order with the New York State Industrial Board of Appeals. It challenged the order on a number of grounds including the claimed preemption of §198-c by ERISA. *Burlington I* (A-25).

On December 2, 1983, Burlington filed a motion to dismiss and for summary judgment in this action, claiming that the state law causes of action were preempted by ERISA and that it was entitled to summary judgment on the ERISA causes of action.

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* Section 198-c makes it a misdemeanor not to pay benefits or wage supplements, defined to include severance pay, due employees. (A-51). The Labor Law also provides an administrative procedure, utilized by the employees in this case, for the Commissioner of Labor to enforce an employer's obligation to pay benefits.

Burlington I (A-25). On January 5, 1984, the Commissioner was granted leave to intervene. *Burlington I* (A-25). The Commissioner opposed the motion to dismiss upon several grounds one of which was that, because Burlington's severance pay policy was a simple agreement between Burlington and its employees, it was not an "employee welfare benefit plan" subject to ERISA and the state was not preempted from enforcing it.* *Burlington I* (A-27). The Commissioner relied on a United States Department of Labor ("USDOL") regulation which excluded from ERISA's coverage employer compensation practices in which the payments were made to the employee directly from the employer.

On September 17, 1984, the district court issued a decision and order, granting Burlington's motion to dismiss the state law causes of action, denying its motion for summary judgment on the ERISA causes of action, and permanently enjoining the Commissioner from enforcing the compliance order against Burlington. *Burlington I* (A-21, 31). The district court held that Burlington's policy was an ERISA plan because it provided benefits of the type enumerated in §3(1) of ERISA, 29 U.S.C. §1002(1).** *Burlington I* (A-28). It indicated that to hold that Burlington's policy was not an ERISA plan would have the effect of permitting employers to evade liability under ERISA simply by failing to comply with it. *Burlington I* (A-29). The court did not address the applicability of the USDOL regulation relied upon by the Commissioner. The Commissioner filed a notice of appeal from the order on October 9, 1984.

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* Under §514 of ERISA, 29 U.S.C. §1144, only state laws which relate to an "employee benefit plan" as defined in ERISA are preempted. (A-49). Thus, if Burlington's severance pay policy is not a "plan" as defined by ERISA, the state may enforce its state law requiring Burlington to pay severance pay.

** Benefits which may be the subject of an ERISA plan under §3(1) include "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, prepaid legal services," holiday, and severance benefits. 29 U.S.C.§1002(1). The latter two benefits are included by virtue of ERISA's incorporation of the benefits described in §302(c) of the Taft-Hartley Act, 29 U.S.C. §186(c).

On October 30, 1984, the district court entered a judgment under Fed. R. Civ. P. 54(b) dismissing the plaintiffs' state law claims and the Commissioner's complaint in intervention. (A-34). The Commissioner and the plaintiffs filed notices of appeal from the judgment on November 1 and 2, 1984, respectively. The three appeals were consolidated.

On June 17, 1985, the Second Circuit Court of Appeals affirmed the district court. *Burlington II* (A-1). The court also held that Burlington's severance pay policy is an employee benefit plan covered by ERISA because it provided a benefit enumerated in ERISA's definition of employee welfare benefit plan and that, therefore, the state is preempted from ordering Burlington to pay severance pay. *Burlington II* (A-10). The court rejected the argument of plaintiffs, the Commissioner, and the amici* that a promise or agreement between an employer and its employees to pay benefits does not constitute a welfare benefit plan within the meaning of ERISA. The court expressly declined to reach the issue of whether Burlington's policy fell within the scope of the USDOL regulation and was, for that reason, excluded from ERISA's coverage. *Burlington II* (A-13).** The Commissioner filed a timely notice of appeal to this Court on September 11, 1985. (A-36).

REASONS THIS COURT SHOULD GRANT PLENARY CONSIDERATION OF THE SUBSTANTIAL QUESTION PRESENTED BY THIS APPEAL

This Court should grant plenary consideration for two reasons. First, this case raises a substantial issue of federal preemption

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* The Commissioner and plaintiffs were joined on the appeal by ten states and the District of Columbia that filed a brief as *amici curiae*.

** The Commissioner and the plaintiffs also claimed in both the district court and the court of appeals that, even if Burlington's personnel policy was an ERISA plan, N.Y. Labor Law §198-c was not preempted because it did not regulate the terms and conditions of such a plan, but only enforced the plan's own terms. Therefore, it was argued, the state law did not "relate to" a plan within the meaning of ERISA's preemption provision, 29 U.S.C. §1144. The Commissioner does not raise that issue on this appeal.

never before addressed by this Court. Second, the issue is an important one having nationwide impact.

This Court has more than once construed ERISA's preemption provision, most recently addressing the exception for state insurance regulation in *Metropolitan Life Insurance Co. v. Massachussets*, ____ U.S. ____, 105 S. Ct. 2380 (1985). It has on several occasions considered the reach of ERISA's language preempting state laws which "relate to" employee benefit plans. Nonetheless, it has never construed the scope of the term "employee benefit plan". This case, involving as it does the question whether a simple personnel policy issued by an employer to its employees is an ERISA "employee benefit plan" so as to preclude the state from enforcing the employer's obligation under state law to adhere to its policy, raises such an issue.

The ERISA definition of "employee benefit plan" is vague.* If it is to be given the elastic interpretation assigned to it by the court below, it could cover any employer promise in a personnel manual to pay any type of compensation, other than straight wages, to employees. For example, as construed by the court below, the ERISA definition of "employee benefit plan" could arguably be interpreted to include even a promise by an employer to give its employees a paid holiday for Martin Luther King's Birthday or to provide its employees with a day of paid sick leave.

ERISA, however, as the United States Department of Labor has recognized in interpretive regulations, was intended and crafted to regulate "plans" not "employers", with the word "plan" having a particular meaning. Congress did not intend that the term "plan" cover obligations which extend directly from an employer to its employees. The subject of its concern was obligations to employees incurred by an entity apart from the employer.

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* While the definition is worded broadly, it nevertheless indicates a distinction between an employer and a plan since it speaks of a "plan, fund, or program" "established or maintained" by an employer, and it does not include compensation practices of an employer. 29 U.S.C. §1002(1). (A-40).

Until ERISA's passage, this relationship was essentially unregulated, and employees' legitimate expectations as to benefit obligations were often unsatisfied.

Congress was well aware that employees who were denied benefits because of plan technicalities, plan mismanagement, or inadequate funding of plans had no recourse because employers were not directly liable for plan benefits. Thus, Congress in ERISA set standards for "plans," intended to protect the security of employee benefits for which the plans were obligated, and it provided a remedy, where none had previously existed, for employees who were denied expected benefits.

However, in doing so, Congress did not, as this Court has recognized, intend to supplant or extinguish any rights and remedies which employees held, long before ERISA's enactment, against employers who failed to satisfy their own obligations to pay benefits. The interpretation of the court below has precisely that effect. It obliterates employees' state statutory remedies which in New York and number of other states include effective administrative enforcement mechanisms. Worse yet, it nullifies the right of employees to sue their employers for breach of contract under state law. There is no indication in ERISA's history that Congress intended to clog the federal courts with employee claims for severance pay, vacation pay, holiday pay, and any other promised benefit. Congress' intent was to provide a new remedy, not to deprive workers of their traditional remedies against employers. Were the latter Congress' intent, many of ERISA's provisions would be superflous and irrelevant.

Plainly, then, this case raises important issues which have nationwide impact. No fewer than 23 states have laws similar to N.Y. Labor Law §198-c which provide state remedies against employers who fail to live up to their commitments to pay benefits. Other states recognize common law breach of contract remedies against employers for wages and benefits. Hundreds of thousands of workers rely upon such remedies. The interpretation given ERISA by the court of appeals would invalidate each of these state laws and state common law and relegate workers

to federal court actions, imposing on them the burden of proving that their employers acted in an arbitrary and capricious manner, in order to recover even one day of severance pay. Congress did not intend such a result.

I. THIS COURT SHOULD GRANT PLENARY CONSIDERATION TO RESOLVE A SUBSTANTIAL QUESTION OF FEDERAL PREEMPTION NEVER BEFORE ADDRESSED BY THIS COURT WHICH WAS RESOLVED BY THE COURT BELOW IN CONFLICT WITH CONGRESSIONAL INTENT AND PRINCIPLES ENUNCIATED BY THIS COURT.

A. CONTRARY TO THE DECISION OF THE COURT BELOW, CONGRESS DID NOT INTEND THAT ERISA REGULATE EMPLOYER PROMISES TO PAY BENEFITS TO EMPLOYEES.

1. Congress Intended ERISA To Regulate The Unregulated Field of Benefit Plans.

The legislative history of the Employee Retirement Income Security Act demonstrates unequivocally that Congress viewed ERISA as regulating entities separate and distinct from employers. Even though such entities were established by employers (and sometimes unions), they had a legal existence of their own in which they, not the employers who established them, were liable for payment of benefits. In 1974, after extended study, Congress enacted the Employee Retirement Income Security Act to protect the interests of participants in employee benefit plans. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983). One of the central purposes of ERISA was to prevent the " 'great personal tragedy' suffered by employees whose vested benefits are not paid when pension plans are terminated." *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 374 (1980).

The subject of congressional concern, the benefit plan, was a "relatively modern economic institution" which had become an important social and economic factor only since the mid-1940's. H. Rep. No. 93-533, reprinted in [1974] U.S. Code Cong. & Ad.

News 4639, 4640. Benefit plans, Congress found, were subject to only minimal, inadequate federal regulation* and were virtually unregulated by state legislation. *Id.* at 4641-42. *See* Senate Committee on Labor and Public Welfare, Final Report on Welfare and Pension Plans Investigation, S. Rep. No. 1734, 84th Cong., 2d Sess. 68 (1956); Senate Committee on Labor and Public Welfare, Interim Report of Activities of the Private Welfare and Pension Plan Study, S. Rep. No. 634, 92nd Cong., 2d Sess. (1972). The plan participants were left to rely upon the state common law of trusts, codified in only a few states, which Congress found inadequate because state law, like existing federal law, did not protect the security of benefits.

Employers' compensation practices, on the other hand, were not a recent phenomenon and had for decades been thoroughly supervised by state courts and administrative systems, pursuant to legislation and common law contract principles.** Congress' concern thus was not with enforcing *employer* contractual obligations to employees, but with the inability or unwillingness of *benefit plans* to meet their benefit obligations to participants because of overly strict vesting requirements, inadequate funding, and misfeasance and malfeasance by the administrators and trustees.***

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* Not until 1958 did Congress enact legislation, the Welfare and Pension Plans Disclosure Act, repealed by ERISA, which was specifically designed to regulate benefit plans. By requiring the disclosure of information about plans, the Act was intended to permit the participants to protect themselves. However, without substantive standards for plan operation, its intent was not fully achieved. *Id.* at 4641-42.

** New York State has regulated employer compensation practices since the 19th century. 1897 N.Y. Laws ch.415 §9.

*** In 1971, the Senate Committee on Labor and Public Welfare reported on a number of case histories illustrating these flaws in the private benefit plan system. For example, in one case, a joint union-employer trust plan had no vesting provision and had $800,000 in loans outstanding for which there was no collateral. Similarly, the Senate Committee pointed to a major aerospace company's pension plan in which 20,000 out of 60,000 participants left the plan

(Footnote Continued)

In ERISA, therefore, Congress prescribed minimum standards of vesting, funding, and fiduciary conduct to minimize the risk that workers would lose expected benefits, 29 U.S.C. §§1053, 1082, and 1102-04. It provided a system of compulsory benefit insurance to protect the security of benefit rights in the event of benefit plan termination. 29 U.S.C. §§1321-23. Congress also created a right of action in federal court for employees to recover benefits due from a plan. 29 U.S.C. §1132(a) and (f). Such provisions would have been superflous and unnecessary if Congress' intent in ERISA had been to regulate an employers's contractual liability to its employees and provide a remedy for an employer's breach of its contract obligations.

The problems which ERISA was enacted to remedy – the lack of employee knowledge about plan terms and conditions, and the risk of loss of benefits in the event of plan termination because of underfunding, lack of vesting provisions, and negligent or fraudulent plan management – were problems which prior to ERISA had no adequate remedy in the law. There existed no federal, and only a few state, statutes providing a right for an employee to sue a plan and, even if an the employee did so under state law, the common law of trusts which was generally applied to that type of a claim was not adequate to protect the employee's rights.* *See* Senate Committee on Labor and Public Welfare, Final

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(Footnote Continued)
without entitlement to any benefit, even though one-fourth of those 20,000 had over five years of service. Furthermore, that plan's liabilities exceeded its assets by more than $75 million. Thus, the Report concluded, "if the plan were to terminate today, employees with vested benefits would have no legal remedy to obtain all their vested benefits." *Id.*, Appendix at 138. Congress' view that no remedy existed in such cases plainly shows that it did not intend to include within ERISA's coverage employer agreements with employees to pay benefits since those agreements could be enforced under state statutes and common law.

* The Report on the House version of ERISA states:

> In almost every instance, participants lose their benefits not because of some violation of federal law, but rather because of the manner in which the plan is executed with respect to its contractual requirements of vesting or funding. *Courts strictly interpret the plan*

(Footnote Continued)

Report on Welfare and Pension Plans Investigation, S. Rep. No. 1734, 84th Cong., 2d Sess. 65-68 (1956).

2. Congress Did Not Intend ERISA To Supplant And Nullify Direct Employer Liability For Employee Benefits.

Congress was well aware that employers, once having established a plan, had no financial responsibility for benefit payments beyond the contributions they were committed to make.* Senate Committee on Labor and Public Welfare, Interim Report of Activities of Private Welfare and Pension Plan Study, S.Rep. No. 634, 92nd Cong., 2d Sess. 74 (1972). Given that understanding and the fact that states had been regulating employer compensation practices for decades, it is plain that ERISA was not intended to regulate employer-employee agreements involving

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(Footnote Continued)

> *indenture and are reluctant to apply concepts of equitable relief or to disregard technical document wording.* Thus, under present law, accumulated pension credits can be lost even when separated employees are within a few months, or even days, of qualifying for retirement. (emphasis added).

H. Rep. No. 93-533, reprinted in [1974] U.S. Code Cong. & Ad. News at 4643.

* Representative Erlenborn commented:

> At the present time the legal foundation of pension plans is that the employer sets up a pension trust and promises to make periodic contributions into that trust. If there are sufficient assets, the employee will get the pension that has been described; if there are not, he does not get it; he gets something less. But the employer up until the present time generally has not made a promise to pay the pension, only to make periodic contributions.

120 Cong. Rec. 4285 (Feb. 2, 1974), reprinted in 2 Legislative History of the Employee Retirement Income Security Act of 1974, 94th Cong., 2d Sess. 3388 (Comm. Print 1976).

benefits, and nothing in its text indicates otherwise.* To the extent Burlington's policy constitutes a direct obligation of Burlington to pay benefits to its employees, it is not therefore governed by ERISA.

That ERISA does not regulate or limit an employer's contractual obligations to its employees was noted by this Court in *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359 (1980). In *Nachman*, the Court found a difference between "plan liability" for benefits and "direct employer liability" for benefits. The employer in *Nachman* had disclaimed liability in the plan document for payment of benefits. When the plant closed and the plan was terminated, the plan had only enough assets to cover 35 percent of the vested benefits. ERISA provides insurance for such terminations through the Pension Benefit Guaranty Corp. ("PBGC") but imposes reimbursement liability on the employer for benefits paid by PBGC for up to 30 percent of the employer's net worth.

Nachman asked the court for a declaration that it had no reimbursement liability. It had itself disclaimed liability for any benefits beyond those the plan funds could satisfy, and the plan could not satisfy the full amount of the benefit obligations. The employees, Nachman argued, had no rights to the full amount; therefore, it had no reimbursement liability.

Holding that a plan's liability governed by ERISA and addressed by plan termination insurance is separate from an employer's direct liability for benefits, this Court rejected the employer's argument. It did not agree that only if an employer is directly liable for the benefit payments does it have reimbursement liability under ERISA. *Id.* at 359 n. 29. The Court

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** The statutory provisions are directed to the regulation of a "plan" as an entity apart from an "employer." *See* 29 U.S.C. §§1022 and 1102. (A-45-A-47). Under ERISA, the plan is to have a plan administrator who is required to publish and file an annual report for the plan, 29 U.S.C. §§1023 and 1024. A plan may sue and be sued and a judgment against a plan is not enforceable against the employer who established it. 29 U.S.C. §§1132(d)(1) and (2). (A-48). ERISA also prohibits certain transactions between a plan and the employer. 29 U.S.C. §§1106(a) and 1107.

distinguished clearly between the rights of employees to benefits which are enforceable against the plan and the rights employees may enforce directly against their employer. It concluded that even if an employer by agreement limits its direct liability for benefit payments to employees, it does not by doing so limits its employees' rights against the plan, rights which are regulated by ERISA. *Id.* at 378. The employer's disclaimer operated to protect it only from direct liability for benefit claims, and, indeed, this Court noted, had the employer not disclaimed liability, "the employee could sue the employer directly." *Id.* at 359 n. 29.

What the court below held, that direct employer liability for benefits is supplanted by ERISA, is therefore at odds with this Court's interpretation in *Nachman*. *Nachman* distinguished between plan liability and employer liability and acknowledged that, in the absence of a disclaimer by the employer, employees could sue their employer directly. Given this Court's acknowledgement that ERISA governs the liability of a plan for benefit payments, but does not alter the direct liability of an employer for benefits, the decision of the court below is simply incorrect. That decision merges employer liability for benefits into plan liability for benefits. In essence, it compels the conclusion that employees, as a result of ERISA, have no right to enforce direct employer liability for benefits.* Such a conclusion, as noted, places the court below in conflict with this Court's view of ERISA enunciated in the *Nachman* case.**

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* By preempting N.Y. Labor Law §198-c and state breach of contract law, the court below has limited employees who are owed any benefits by an employer to suing a "plan" under ERISA. Since generally, under ERISA, the decision of an administrator of a benefit plan to deny benefits is subject to reversal only if it is arbitrary and capricious, made in bad faith, or unsupported by substantial evidence, an employee, after the court of appeal's decision, will have to prove much more than simply that the employer defaulted on a promise.

** Three other circuit courts have decided cases involving the claimed preemption of state laws which enforce employer promises to pay benefits. Those courts have, like the court below, held that an employer's personnel policy is an ERISA plan merely because it provided a benefit described in ERISA. *Slack v. Burlington Industries, Inc.*, Nos. 84-2241(L) and 2257, slip op. at 11-12 (4th Cir.

(Footnote Continued)

B. THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH UNITED STATES DEPARTMENT OF LABOR REGULATIONS INTERPRETING ERISA.

The potentially unlimited breadth of ERISA's definition of "employee welfare benefit plan" prompted the United States Department to Labor ("USDOL") to issue a clarifying interpretation, interpreting the definition of "plan" to exclude employer practices in which an employee receives compensation directly from employer assets. 29 C.F.R. §2510.3-1. (A-49). The court below declined to determine whether Burlington's severance pay policy is excluded from ERISA's coverage by virtue of the USDOL regulation on the ground that the court had "concluded for other reasons that an unfunded severance pay policy is included within the definition of 'welfare plan'." *Burlington II* (A-13). However, since an agency's interpretation of the statute it administers is entitled to due deference and since the USDOL regulation interprets the term "employee welfare benefit plan" for purposes of ERISA coverage, if the regulation applies to Burlington's policy then that policy is simply not covered by ERISA and the "other reasons" which the court below found to support its conclusion would not sustain its holding.*

(Footnote Continued)
Sept. 3, 1985); *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1503 (9th Cir. 1985); *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir. 1981), *aff'g.*, 491 F.Supp. 1188, 1196 (E.D.Mo. 1980), *cert. denied*, 454 U.S. 968, 1084 (1981). *But see California Hospital Association, et al. v. Henning*, Nos. 83-6381 and 6416 (9th Cir. Sept. 6, 1985). These cases do not discuss the argument made by appellant herein that Congress did not intend ERISA to supplant direct employer liability for employee benefits.

* As noted, the court's analysis focussed on whether severance pay was one of the benefits enumerated in §3(1)(A) or §3(1)(B) of ERISA. The court held severance pay fit within §3(1)(A) because it is an "unemployment benefit" and within §3(1)(B) which incorporates severance pay as a benefit described in § 302(c) of the Taft-Hartley Act, 29 U.S.C. §186(c). The Court rejected the plaintiffs' argument that only "funded severance pay plans" are covered by §302(c) and, thus, by ERISA, as well as the plaintiffs' contention that a benefit promised because of years of service and not expressly conditioned on a period of unemployment is not an "unemployment benefit."

While the regulation, in listing certain specific practices which are excluded from ERISA coverage because they are not considered "plans", does not expressly mention severance pay, as the court below recognized, the list was not meant by the USDOL to be exhaustive. *Burlington II* (A-13).* Specifically included among the practices excluded from ERISA's coverage are sick leave pay, 29 C.F.R. §2510.3-1(b) (2), (A-50) and holiday and vacation pay, 29 C.F.R. §2510.3-1(b) (3)(i), (A-50) each of which is, like severance pay, a benefit enumerated in the section of ERISA describing the benefits which may be the object of an ERISA plan. 29 U.S.C. §1002. The USDOL excluded such practices from ERISA coverage because they are "associated with regular wages or salary," and, furthermore, because "the abuses which created the impetus for the reforms in [ERISA] were not in this area, and there is no indication that Congress intended to subject these practices to [ERISA's] coverage," notwithstanding that the broad language of the definition of "plan" could arguably cover them. Notice of Proposed Rulemaking, 40 Fed. Reg. 24642, 24642-43 (June 9, 1975).

However, according to the USDOL regulation, these practices are excluded from ERISA only if the compensation is paid directly from the employer. This is in accord with congressional intent. Where there exists an entity other than the employer liable for the payments, the concerns of Congress would, of course, favor ERISA coverage. Where, however, the employer itself is obligated to make such payments, the need for a special ERISA remedy to protect the security of the employees' benefits does not exist because the employer may be sued directly for the benefits, and the ERISA remedy adds nothing to that long-established right.

Although the USDOL regulations do not specifically refer to severance pay, there is no logical basis for distinguishing it from

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* The regulation reads, in part:

> Some of the practices listed in this section as excluded from the definition of "welfare plan"... are inserted in response to questions received by the Department of Labor and, in the Department's judgment, do not represent borderline cases under the definition in section 3(1) of the Act.

the practices which are stated to be within ERISA's coverage. Severance pay, under Burlington's policy, is compensation paid directly by the employer out of its general assets, and it is treated by Burlington as regular wages. It is an obligation for which Burlington itself, and not a plan, is liable. The failure of the court below to find that Burlington's policy is, under the USDOL interpretation, excluded from ERISA's coverage requires reversal.

II. THIS COURT SHOULD GRANT PLENARY CONSIDERATION BECAUSE THE ISSUES ARE OF GREAT IMPORTANCE TO A LARGE NUMBER OF OTHER STATES AND TO HUNDREDS OF THOUSANDS OF EMPLOYEES.

This appeal also merits plenary consideration to resolve the substantial issue presented concerning the continuing validity of state benefit collection statutes which operate in at least 23 states* and the state common law breach of contract rights of workers

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* Each of the following states, like New York, make it a violation of state statutory law for an employer to refuse to pay agreed-upon benefits to employees. California, Cal. Labor Code §§227, 227.3 (West 1971 & Supp.1985); Connecticut, Conn.Gen.Stat. Ann. §§31-72 (West 1972 & Supp. 1985); Delaware, Del.Code Ann. tit.19, §1109 (1979); Illinois, Ill.Ann.Stat. ch.48, §§39m-2–39m-11 (Smith-Hurd Supp. 1985); Iowa, Iowa Code Ann. 91A.2 (West 1984); Kansas, Kan.Stat.Ann. §§44-313 (1981); Kentucky, Ky.Rev.Stat. §§337.010-337.060 (1983); Maine, Me.Rev.Stat.Ann. tit. 26, §629-A (West Supp. 1984-1985); Michigan, Mich.Comp.Laws Ann. §408.473 (West 1985); Minnesota, Minn.Stat.Ann. §181.74(West Supp. 1985); Montana, Mont.Rev.Codes Ann. §39-3-201 (1983); New Hampshire, N.H. Rev. Stat. Ann. §275: 43(III)(Supp. 1983); New Jersey, N.J. Stat.Ann. §2A:170-90.2 (West 1971); New Mexico, N.M. Stat.Ann. §§50-4-19–50-4-30 (1978); North Carolina, N.C. Gen. Stat. §§95-25.2–95-25.6 (1981); Ohio, Ohio Rev.Code Ann. §§4113.15 (Page 1980); Oklahoma, Okla.Stat.Ann. tit.40 §165.1 (West 1954 & Supp. 1984-1985); Pennsylvania, Pa.Stat.Ann. tit.43 §260.29(Purdon Supp. 1985); Vermont, Vt.Stat.Ann. tit.21, §345a (1978); West Virginia, W. Va. Code §§21-5-1–21-5-6 (1981); Wisconsin, Wis.Stat.Ann. §109.01 (West Supp. 1984-1985); District of Columbia, D.C. Code Ann. §§36-101–36-110 (1981).

which exist in most, if not all, states. The resolution of the question presented, therefore, will have an impact on hundreds of thousands of workers.*

Without access to state law remedies to recover benefits due directly from their employers, employees will be forced to commence an action under ERISA in federal or state court to recover even one week's worth of severance pay. ERISA contains no administrative enforcement procedure; an employee seeking to recover benefits due from a plan must under ERISA commence a civil court action. 29 U.S.C. §1132(a). Furthermore, having done so, the employee must be prepared to prove, not merely that the plan defaulted, but that the plan's refusal to pay benefits was arbitrary. *Burlington II* (A-18-A-19). Depriving workers of their right to avail themselves of either state administrative enforcement procedures or state common law will work a tremendous hardship. In New York alone, in the five-year period from 1980-1984, the New York State Department of Labor handled 16,453 employee claims for wage supplements under §198-c, and collected $3,073,144 in unpaid benefits from employers.** Were the decision of the court below to stand, these employees would be required to either forego enforcement of their benefit rights or retain counsel and sue in court, even though the amount of any individual claim is generally small. Neither result was intended by Congress.

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* Notwithstanding the decision of the court below, workers who are represented by unions retain their breach of contract rights by virtue of §514(d), of ERISA, 29 U.S.C. §1144(d), which saves from preemption "any law of the United States." Unionized workers protected by the National Labor Relations Act, 29 U.S.C. §151 *et seq.*, have the right to arbitrate any claims for benefits covered by their collective bargaining agreements and to sue for breach of contract under the Taft-Hartley Act, 29 U.S.C. §185. However, as of 1984, unionized workers comprised only 20.1% of the working population. U.S. Bureau of Labor Statistics, *Employment and Earnings* (1985). Moreover, workers whose right to organize is protected only by state law, *e.g.*, those not engaged in interstate commerce, would, like non-unionized workers, be deprived of their breach of contract rights by the decision of the court of appeals.

** The State Department of Labor does not handle employee claims for benefits against funded plans. Such claims are referred to the U.S. Department of Labor.

CONCLUSION

For all the foregoing reasons, this Court should summarily reverse or grant plenary consideration of the substantial question presented by this appeal.

Dated: New York, New York
September 13, 1985

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